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No. 93-1533

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PHILLIPS PETROLEUM COMPANY,
PETITIONER,
v.

ROBERTSON OIL COMPANY,
RESPONDENT.

Response to Petition For Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF FOR RESPONDENT ROBERTSON OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Julius Glickman*
Dennis G. Herlong
Glickman & Barnett, L.L.P.
1460 First City Tower
1001 Fannin
Houston, Texas 77002

James W. Jeans, Sr.
UMKC Law School
5100 Rockhill Road
Kansas City, MO 64110

Attorneys for Respondents
*Counsel of Record

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-9001

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QUESTIONS PRESENTED:

1. Whether the Eighth Circuit Court of Appeals abused its discretion in declining to exercise its power to set aside the law of the case where no clear error or manifest injustice was shown and where Robertson would be seriously prejudiced.

2. Whether the multiple historical standards developed under the Arkansas "shock the conscience" criteria along with other specific restraints applied in this case are sufficient under ***Haslip***.

3. Whether two separate punitive damage awards for two separate wrongful courses of conduct are proper when the evidence supports each separate award and petitioner at the first appeal attacked one award and won separate jury questions and a new trial because of separate conduct.

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BRIEF FOR RESPONDENT ROBERTSON OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To convince this Court to grant certiorari, Phillips has mischaracterized the record and omitted pertinent facts without which this case cannot be understood. The Eighth Circuit *en banc* did not say it lacked the power to overturn the law of the case; it said that it should not. That decision was discretionary and correct; it presents no conflict with any other circuit.

Phillips attempts to reduce the Arkansas standard of review to a simple phrase but never mentions that the Arkansas "shock the conscience" standard has been spelled out with specific and definite standards sufficient under ***Haslip***. Phillips never discloses these standards or discusses

the thorough post-verdict review and other constraints in this case that satisfy due process.

The procedural history of this case and the evidence supporting each award of punitive damages belie petitioner's claim of dual punishment. The reason that the trial court submitted two punitive damage issues to the jury at the second trial is because Phillips complained of one punitive damage issue at the first trial. Phillips persuaded the Eighth Circuit in ***Robertson I*** that each tort was supported by separate conduct and one punitive damage issue did not properly apportion punitive damages. Phillips got the due process it wanted but not the result.

Additional Constitutional Provision Involved

"...[N]o fact tried by jury shall be otherwise reexamined in any court of the United States, according to the common law." U. S. Const. amend. VII.

I.

STATEMENT OF THE CASE

Petitioner's statement of the case is not acceptable. Petitioner's specially selected excerpts from the opinions and factual record suggest conclusions that are unwarranted. Robertson now supplies omitted facts and essential holdings of the Court.[1]

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[1] For convenience, "Pet." refers to Petitioner's appendix. ***Robertson I*** refers to the panel decision on March 31, 1989. (Pet. 97a-115a.) ***Robertson II*** refers to the panel decision of April 18, 1991. (Pet. 87a-96a.) ***Robertson III*** refers to the panel decision of November 18, 1992. (Pet. 58a-86a.) ***Robertson en banc*** or ***en banc*** decision refers to the Eighth Circuit ***en banc*** opinion decided on December 28, 1993. (Pet. 1a-

What Phillips Did to Robertson

The facts of this case were set forth fairly in ***Robertson I***. (Pet. 97a-102a.) The story of Robertson is the story of a small businessman destroyed by Phillips. Robertson was a distributor or jobber of petroleum products in Arkansas. For seven years, Robertson had sold gasoline to twenty-three Spe-Dee Mart outlets. Phillips caused Robertson to lose Spe-Dee Mart, the customer that accounted for over sixty-five percent (65%) of Robertson's business. Spe-Dee Mart had sold gasoline under its own logo but to stay competitive, Spe-Dee Mart decided to brand. Brand means to display the Phillips or another company's trademark and logo. Spe-Dee Mart asked Robertson to convert its stores from unbranded to branded Phillips outlets. Phillips fraudulently represented to Robertson for five months that it would brand Spe-Dee Mart stores with the Phillips' logo. Phillips only told Robertson the truth when it was too late for Robertson to immediately provide another branded supplier to Spe-Dee Mart. Then, at a later meeting with Robertson and Spe-Dee Mart, Phillips made it clear to Spe-Dee Mart that they did not want Spe-Dee Mart's business and that Robertson was not someone in whom they had confidence.[2] After the meeting, Phillips behind Robertson's back sought Spe-Dee Mart's business directly and through a competing distributor of Robertson's. (Pet. 100a.) Spe-Dee Mart left Robertson and branded with Unocal. What had taken Robertson a lifetime to build was gone.

56a.) ***Haslip*** refers to ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1 (1991). ***TXO*** refers to ***TXO Prod. Corp. v. Alliance Resources Corp.***, 113 S. Ct. 2711 (1993).

[2] Contrary to Phillips' assertion, Spe-Dee Mart would have continued to do business with Robertson but for Phillips' conduct (Trial II Tr., Vol. 2 at 212-213).

The First Trial

Robertson sued in 1986 and the first trial occurred in October, 1987. The first jury found actual damages of $750,000 and assessed punitive damages at $5 million. Phillips' appeal became ***Robertson I***.

Robertson I - The Genesis Of Two Punitive Damage Awards

In ***Robertson I***, the Eighth Circuit upheld the tortious interference jury finding and actual damages of $750,000. The court said that the district court had correctly stated that all liability theories rested on only one basis for actual damages, the loss of the Spe-Dee Mart account. Then, at Phillips' urging, the Eighth Circuit recognized that a different analysis applied to punitive damages. It found that the conduct of tortious interference, fraud, and good faith and fair dealing were all intentional torts, but that "*each* (emphasis added) involved different conduct." (Pet. 114a.) The court expressly held that "*each* of these theories [fraud, tortious interference, good faith and fair dealing] therefore would support a different amount of punitive damages, depending on the conduct involved." (Pet. 114a.) Phillips never confesses that it originated this argument. (Pet. 21a.) At Phillips' urging, the Court took away $5 million awarded *in toto* as punitive damages and reversed because there was separate conduct for each tort. The court denied both sides' suggestion for rehearing *en banc*. Petitioner did not apply for writ of certiorari. The universe of issues to be resolved at a second trial was reduced to two: whether Phillips committed fraud and the penalties, if any, to be assessed for fraud and tortious interference. Dismayed, Robertson went back to the district court for yet a second trial held in 1990.

The unique circumstances under which both Robertson and Phillips engaged in a second trial make this case unusual and not likely to be repeated.

Phillips Gets a Second Chance With a Second Trial

The trial court held a second jury trial for Phillips. The second jury found fraud, malice and that an award of punitive damages for each of the two separate courses of conduct was justified. The jury found $4 million dollars in punitive damages for tortious interference and $4 million dollars in punitive damages for fraud. Phillips appealed for the second time.

The Appeal Of The Second Trial -- *Robertson II*

In ***Robertson II***, the court recognized that the jury had sufficient evidence that Phillips acted with malice in committing fraud. Phillips did not challenge the malice finding as to fraud. The court further found that the jury instructions were proper and that the jury had found all the elements necessary for punitive damages. (Pet. 92a.) Accordingly, the Eighth Circuit affirmed on all evidentiary and fact issues. (Pet. 96a.) The court held that the jury instructions were comparable to ***Haslip*** and satisfied due process. Indeed, the court held that Phillips also waived its objection to the instructions because it made no proper objection based on lack of standards. (Pet. 95a.) The Court said that, since there was no written opinion by the trial court, it was "unable to evaluate the adequacy of the district court's review of the award." (Pet. 96a.) In April 1991, the court then sent the case back to the district court to dispose of this one remaining issue and write an opinion regarding the propriety of the punitive damages award. Petitioner elected not to appeal after *en banc* consideration was denied. It had been over six and one-half years since Phillips put Robertson out of business.

Phillips Gets A Third Try - The Review By The Trial Court

For the third time, the parties appeared before the trial court who refused to set aside or reduce either award. The trial court wrote a thorough opinion and this review constituted an additional restraint on the jury. (Pet. 116a-123a.) Although ***Haslip*** was satisfied, Phillips was not.

Phillips Gets A Fourth Chance - *Robertson III* - The Last Remaining Issue

Phillips appealed for the third time. One question remained. Did the trial court, in reviewing the amount and propriety of punitive damages, meet the standards of the ***Haslip*** case? The court *en banc* held that it did.

Phillips even seeks to gain one vote on the *en banc* review. The vote was 7-3 with one justice joining the dissent only on the dual punishment issue.

II.

REASONS FOR DENYING THE WRIT

A proper identification of the issues demonstrates why this Court should deny certiorari. Petitioner seeks to transform well recognized rules of appellate procedure into non-existent circuit conflicts and asserts questions of due process already resolved in ***Haslip***. Phillips' points amount to no more than the routine application of principles of law. It does not invoke the "special and important" reasons set forth by the Court that would justify review of this case.

Petitioner presents Question 1 as an issue of whether a Federal Court of Appeals, sitting *en banc*, is bound by

previous interlocutory decisions. Nothing in the *en banc* decision even hints that the court was "bound" by the previous decisions. The court simply rejected the dissent's position that the "entire litigation be reopened for review." The majority voted that it "should not" do this, not that it "could not." (Pet. 4a n.5.)

The *en banc* decision does not conflict with other circuits regarding the power of the court *en banc* to review a panel decision. The principles for overturning the law of the case as applied in the Eighth Circuit was fully examined and "firmly endorsed" in ***Liberty Mut. Ins. Co. v. Elgin Warehouse and Equipment***, 4 F.3d 567, 573 (8th Cir. 1993). (Pet. 4a n.5.) The court's decision not to review panel decisions in the absence of a showing of clear error, manifest injustice, or prejudice to the other party is compatible, not conflicting, with the holdings in other circuits. 1B James W. Moore, et al., ***Moore's Federal Practice***, § 0.404 [4.-6] n.42 (2d ed. 1993) (outlining similar tests in each of the circuits). The decision by the *en banc* court not to reopen a decision made in this litigation over five years ago was discretionary. ***Arizona v. California***, 460 U.S. 605, 618 n.8 (1983). Petitioner advances no arguments to suggest that the exercise of that discretion was arbitrary or capricious. This Court should decline the invitation to micromanage the discretionary rulings of each of the circuits in applying their *en banc* rules.

Question 2 attempts to characterize the Arkansas standard of review as a simple "shock the conscience" test that violates due process. Petitioner has ignored the definitive, scholarly analysis of the constraining standards that have evolved under the "shock the conscience" standard of Arkansas law articulated by Judge Morris Arnold. (Pet. 116a-123a.) Petitioner fails to mention the *en banc's* affirmation of those standards and analysis under ***Haslip*** and

TXO. (Pet. 5a-15a.) These standards limit discretion and comply with ***Haslip*** and ***TXO***. Judge Arnold's review was itself a sufficient restraint under ***Haslip***. The Eighth Circuit's examination of the instructions, of the trial court's review and of the standards under Arkansas law constitute an additional constraint on unlimited discretion.

Question 3 contains Petitioner's complaint of two separate punitive damage awards for two separate wrongful courses of conduct. Petitioner seems to have a lapse of memory. In ***Robertson I***, it complained that the single punitive damage award the jury assessed was not specifically tied to any one or more of separate wrongful courses of conduct with which it was charged and each tort involved different conduct. Petitioner won its point in ***Robertson I***. On retrial, the trial court did as Petitioner requested and the jury was invited to consider the possibility of punitive damages for each of the two counts of fraud and intentional tortious interference, each of which Phillips had said was supported by separate conduct of Phillips. The jury obliged and awarded two separate amounts for two separate wrongful courses of conduct. Three quotations from Petitioner's reply brief of August 2, 1988 in ***Robertson I*** are worthy of attention here because, as the Eighth Circuit *en banc* noted, they conclusively discredit Phillips' disingenuous argument. (Pet. 21a, 22a.) These complete quotations can be found in the *en banc* opinion but we summarize them here. In 1988, Phillips said that the one punitive damage award was improper because it was "impossible to apportion the award among the various theories of liability . . . and, neither of the punitive damages interrogatories [one as to entitlement and one as to amount], are tied to specific torts." (Pet. 21a.) In 1988, Phillips also said the compensatory award had no bearing on punitive damages because punitive damages depend upon the conduct of the defendant, not upon the loss to the plaintiff. (Pet. 21a.) Still unmindful of what it argues

today, Phillips said then that were two different time frames for the torts of fraud and tortious interference. (Pet. 22a.)

The court *en banc* said, "Phillips got what it asked for." (Pet. 22a.) Basic fairness says Phillips should live with what it got, and the evidence requires it. Each of the jury findings of punitive damages on tortious interference and fraud is supported by evidence of separate conduct as the *en banc* court held. (Pet. 22a.) Phillips offers no proof to the contrary.

Not only is Petitioner's position troubling because it seeks to retain the benefits of its victory in ***Robertson I*** which directly conflict with its position here and ignores the evidence in support of each award, but Phillips' argument lacks merit for an entirely different reason. It waived any claim of dual punishment. It never objected to dual damage questions to the jury at the second trial. (Trial II Tr., Vol. 3 at 184, 189, 193-198.) Nor did Phillips ever claim, except before this Court, that ***Robertson I*** should be revisited. (Pet. 19a n.13.) Petitioner has not preserved its dual punishment claim.

Petitioner, for good reason, is never explicit about what it wants this Court to do if certiorari is granted. In overturning the law of the case, Petitioner would open up the entire litigation and begin anew. This would be unfair to Robertson. Robertson lost a $5 million punitive damage award because of Petitioner's first appeal. Petitioner accepted and enjoyed the benefit of wiping out a $5 million jury award and gained a second chance to eliminate or reduce all punitive damages. After ***Robertson I***, Robertson accepted $750,000 and Phillips accepted a release from Robertson on actual damages. (Supp. App. 1a) Is Robertson to give back that money? At a third trial, does Petitioner want one punitive damage issue which it attacked in

Robertson I or does it want two punitive damage issues which it attacks now? Petitioner has in this appeal directly contradicted the position that it took in the first appeal and asks Robertson to pay the price for Petitioner's success in ***Robertson I***. For Petitioner, it is "heads I win, tails you lose."

And to what end? Nothing important will be added to the law of the case doctrine among the circuits nor will the restraints imposed by ***Haslip*** be changed or clarified. While the outcome may be of vital importance to the parties, the distinctive nature of this case should have little precedential value beyond its facts. Other than the application of ***Haslip***, which itself presents nothing novel, Petitioner has raised only evidentiary and procedural questions which are not constitutional and which were correctly decided.

And what of the harm? Even though the alleged errors were different each time, both juries rendered substantially similar awards. Those two trials make it apparent that Phillips does not need another trial. It needs different facts. In context, Phillips' alleged errors are at best harmless.

During this eight year judicial saga, there have been six separate decisions rendered in this case. Two of those decisions have resolved the facts and assessed the penalty; four of those decisions resolved points of law and, with each resolution, the legal issues were reduced and finally eliminated. Phillips' remedy is to send Robertson into a vicious circle of litigation and disregard all that has happened before. This is neither good law nor wise policy.

The appellate process has served its purpose.

III.
THE EIGHTH CIRCUIT CORRECTLY DECLINED TO EXERCISE ITS POWER TO VACATE *ROBERTSON I* UNDER THESE UNIQUE FACTS AND THAT REFUSAL PRESENTS NO CONFLICT AMONG CIRCUITS. MOREOVER, PHILLIPS HAS WAIVED THIS POINT.

Petitioner claims that the Eighth Circuit held that it was "bound" by previous "interlocutory panel opinions" and that such constraint presents conflicts with the Second, Sixth, and Ninth Circuits. (Pet. i and 10.) Neither claim is accurate. The Eighth Circuit did not claim that it "could not" overturn the law of the case. It said that the court "should not" under the circumstances of this case. (Pet. 4a n.5.) The court was correct in refusing to set aside a case decided over five years ago, especially where Petitioner saved $5 million dollars and persuaded the court to adopt the very position that it now says should be set aside.

Phillips' inability to meet either the clear error or manifest injustice requirement is revealed in the doctrine of estoppel. The two punitive damages awards were precisely what Phillips asked for and used as a basis in ***Robertson I*** to reverse the trial court which submitted only one punitive damage question. This is not only law of the case but estoppel. (Pet. 22a, 77a.) This factor makes ***Robertson*** unique. Phillips has been content to let these findings by the court pass without response in its briefs. The cases and the facts further belie Petitioner's so-called conflicts.

The Eighth Circuit's view of the law of the case was expressed in ***Liberty Mut. Ins. Co. v. Elgin Warehouse and Equipment***, 4 F.3d 567, 573 (8th Cir. 1993) (holding that it would not disturb prior panel's decision unless intervening controlling authority reached contrary decision or unless

prior panel decision was clearly erroneous and would work a manifest injustice). Relied upon by ***Robertson en banc*** (Pet. 4a-5a n.5; 19a n.13), ***Liberty Mutual*** is consistent with the rule in all circuits and this Court. 1B James W. Moore et al., ***Moore's Federal Practice***, § 0.404 [4.-6] (2d ed. 1993); ***Arizona***, 460 U.S. at 618; ***Christianson v. Colt Industries Operating Corp.***, 486 U.S. 800, 817 (1988). The cases cited by Phillips from other circuits do not raise a conflict. The Second, Sixth, and Ninth Circuits apply essentially the same rule as every other circuit. ***In Re United States Steel Corp.***, 479 F.2d 489, 494 (6th Cir. 1973), ***cert. denied***, 414 U.S. 859 (1973); ***Kimball v. Callahan***, 590 F.2d 768, 771-772 (9th Cir.), ***cert. denied***, 444 U.S. 826 (1979); ***Van Gemert v. Boeing Co.***, 590 F.2d 433, 437 n.9 (2nd Cir. 1978) (***en banc***), ***aff'd***, 444 U.S. 472 (1980).

How each circuit applies clear error, manifest injustice, and prejudice to the parties depends on the facts of each case. Petitioner's cases are factually remote from Robertson. ***Shimman v. International Union of Operating Engineers Local 18***, 744 F.2d 1226 (6th Cir. 1984) (***en banc***), ***cert. denied***, 469 U.S. 1215 (1985) (an attorney who had prevailed at the trial was not entitled to attorney's fees for the first appeal). ***Watkins v. United States Army***, 875 F.2d 699 (9th Cir. 1989), ***cert. denied***, 498 U.S. 957 (1990) (the Army's denial of re-enlistment to an acknowledged homosexual contains no discussion of any of the factors present in ***Robertson***). ***Van Gemert***, 590 F.2d at 436-437 n.8. (***Van Gemert III*** "raises [a] wholly different question" regarding attorneys' fees than did ***Van Gemert II***.)

The Eighth Circuit never denied that it had the power to vacate ***Robertson I***; it simply said it declined in the instant case to exercise that power. Phillips' alleged conflicts are illusory.

Petitioner has not met any requirement to overturn the law of the case. Petitioner's own case points out that reversing the law of the case is improper where "a party would be seriously prejudiced as a result." ***Van Gemert***, 590 F.2d at 437 n.9. Petitioner accepted the benefits of a second trial and a second chance to defeat fraud and reduce or eliminate all punitive damages. Robertson has already been prejudiced by losing the first $5 million award because of one punitive damage interrogatory in ***Robertson I***. It would be additional jeopardy and basic unfairness for Robertson to lose two punitive damage awards because the court agreed with Petitioner's position that the two awards were proper. It would require a company financially ruined by Phillips to proceed to trial for a third time when two juries have spoken.

The underlying but unstated premise of Petitioner is that, in a third trial with different or more standards, a jury would award different amounts. What Petitioner cannot sweep away is its reprehensible conduct. Two juries have spoken on Petitioner's conduct; a learned trial judge has reviewed that conduct and the punitive damages three times. Different words or standards would not have changed the outcome and Petitioner does not argue otherwise. The balancing of interests under due process must also take into account the equity of Robertson and the Seventh Amendment to the United States Constitution which prohibits the reexamination of facts found by a jury. Not once does Petitioner mention the Seventh Amendment.

Petitioner has not made any showing of manifest injustice or that ***Robertson I*** was clearly wrong or "dead wrong." ***City Public Service Bd. v. General Electric Co.***, 935 F.2d 78, 82 (5th Cir. 1991). The Eighth Circuit in ***Robertson I*** made a reasoned decision to remand the punitive damage issues for a new trial which in no way conflicted with ***Gasoline Products Co. v. Champlin Refining Co.***, 283

U.S. 494 (1931) (holding that where jury in breach of contract case did not determine the date of the contract formation, its time for performance, or date of its breach, the jury could not determine actual damages under the contract without retrying liability). In ***Robertson***, the actual damages were determined by the jury. The Eighth Circuit in ***Robertson I*** instructed that at retrial, the determination of the punitive damage award would involve full development of Petitioner's conduct which in fact took place. Consequently, the jury was not impaired in its consideration of whether or not to award punitive damages. Other similar cases have so held. ***Litman v. Massachusetts Mut. Life Ins. Co.***, 825 F.2d 1506 (11th Cir. 1987), ***cert. denied***, 484 U.S. 1006 (1988) (affirmed punitive damages after remand solely on issue of punitive damages); ***Terrell v. Household Goods Carriers' Bureau***, 452 F.2d 152 (5th Cir. 1971) (***en banc***) (affirming liability but reversing for a new trial on damages); ***Terrell v. Household Goods Carriers' Bureau***, 494 F.2d 16 (5th Cir.), ***cert. dismissed***, 419 U.S. 987 (1974) (affirming damages). Since all of the facts were considered at the second trial, the jury could properly assess punitive damages, if any, and meet the requirements of ***Gasoline Products***. ***Robertson I*** was not wrong much less clearly wrong.

Petitioner invites this Court to micromanage matters more properly the concern of each circuit. The decision even to grant the *en banc* review is itself a matter for each circuit to determine. After receiving this rare *en banc* review, Petitioner goes one step further and says that the Eighth Circuit was bound to reverse ***Robertson I***. Whether the Eighth Circuit should vacate one of its prior panel decisions does not affect any other circuit. Normally, intracircuit conflicts are not a sufficient basis of review. ***See Davis v. United States***, 417 U.S. 333, 340 (1974). It should make no difference to the Fourth Circuit how the Eighth Circuit maintains uniformity in its circuit, how it exercises

its discretion to follow the law of the case, or how far it chooses to extend its *en banc* ruling to prior panel decisions. *See* Fed. R. App. P. 35A. There are many factors in determining whether the court should exercise its power to vacate prior decisions. One is whether it would encourage "repeated appeals by the obstinate defendants." ***Roberts v. Cooper***, 61 U.S. 467, 481 (1858), quoted in ***White v. Murtha***, 377 F.2d 428, 431 (5th Cir.), ***adhered to on reh'g***, 381 F.2d 34 (5th Cir. 1967). Workload is also an important factor. ***Liberty Mut. Ins. v. Elgin Warehouse Equipment***, 4 F.3d at 573 (J. Gibson, dissenting).

Petitioner struggles mightily to avoid law of the case by repeated use of "interlocutory" to describe the prior decisions in this case. Decisions of a panel have never been called interlocutory. The inappropriate use of this term to describe ***Robertson I*** and ***II*** wrongly suggests that these decisions were merely passing episodes in a continuing, open-ended process of review awaiting final appraisal by a court sitting *en banc*. Judge Arnold and the parties were bound to follow ***Robertson I*** and ***II***. Both decisions were appealable. Petitioner's semantic creativity to suggest temporality cannot change finality.

Not only does Petitioner's argument fail on the merits, but it is procedurally defective as well. Prior to this writ, Phillips has never asked this Court to vacate ***Robertson I***. (Pet. 19a n.13.) Consequently, Phillips has failed to preserve this point. If Petitioner's claim that ***Robertson I*** was fundamental error and clearly erroneous, it was not recognized to be so by the Eighth Circuit in 1989 nor by Phillips since it never raised the point before any other court.

IV.

ARKANSAS LAW HAS DEFINED "SHOCK THE CONSCIENCE" WITH CONSTRAINING STANDARDS. THOSE STANDARDS, ALONG WITH THE JURY INSTRUCTIONS AND THE POST-VERDICT REVIEW BY THE TRIAL COURT AND APPELLATE COURT, FULFILL *HASLIP*.

Petitioner represents the "shock the conscience" standard as a barren phrase which Arkansas uses to judge punitive damage awards. Petitioner never discloses nor addresses the standards which have evolved and which are spelled out in Judge Arnold's post-verdict review in ***Robertson II*** and by the Arkansas Supreme Court cases of ***Ray Dodge, Inc. v. Moore***, 479 S.W.2d 518 (Ark. 1972) and ***Holmes v. Hollingworth***, 352 S.W.2d 96 (Ark. 1961).

Relying on ***Ray Dodge*** and ***Holmes***, ***Robertson II*** identified the following criteria in evaluating punitive damages:

1. punishment;
2. deterrence;
3. the nature, extent and enormity of the wrong;
4. the intent of the party committing it;
5. the financial and social condition and standing of the parties;
6. the amount of compensatory damages;
7. whether the award "shocked the conscience;"
8. whether the jury was motivated by passion or prejudice;
9. generally, all of the circumstances attending the particular transaction.

These Arkansas standards are limiting. ***Haslip*** condemned "unlimited jury discretion or unlimited judicial discretion . . . that may invite extreme results." 499 U.S. at 18.

Not only does Petitioner ignore these limiting standards, but Petitioner fails to address other factors which led this Court to conclude that due process was satisfied in ***Haslip***. These factors were also present in ***Robertson***: (1) the trial court's instructions provided "reasonable restraints" on jury discretion; (2) the court employed a post-trial review of the award (499 U.S. at 20); and (3) The appellate court reviewed the award of punitive damages under the standards imposed in Arkansas law.

In Robertson, the eloquent post-verdict review was extensive - far more extensive than was sustained in ***Haslip***. The choice of a jurist for such analysis could not have been more apt: the judge before whom both trials were conducted and a brilliant legal scholar well acquainted with Arkansas law. Judge Arnold pointed out that Arkansas has given the shock the conscience standard "a rather definite shape and texture" and has engaged "in a number of rather specific inquiries under the aegis of the general standard." (Pet. 119a.) Judge Arnold examined "the relationship between the relevant parties, the ratio of the punitive award to the compensatory award, the extent and duration of the defendant's acts, the deliberateness of the defendant's acts in the face of no justification for them, the defendant's motives, the defendant's remorse, if any, the defendant's net worth, and other matters in order to judge the propriety of a punitive award." (Pet. 119a.) The court then proceeded to analyze those various factors to see whether they comported with ***Haslip***. (Pet. 119a-122a.)

Judge Arnold noted how "nervous and uncertain in the extreme" defendant's witnesses were and stated that he could understand that a fact finder could have thought them "deliberatively evasive" with "guilty minds." (Pet. 122a.) To this, Phillips makes no reply.

The trial court felt it important that not one, but two juries, each composed of 12 people, had unanimously concluded that it was appropriate to award substantially similar punitive damages. (Pet. 120a.) Indeed, a verdict rendered by twelve citizens, in itself, is good indication of the extent to which the conduct offends a public sense of justice and propriety in particular. 499 U.S. at 40-41; (J. Kennedy concurring). Judge Arnold also regarded it as significant that Phillips committed two intentional torts. (Pet. 120a.) Intent is an important factor in Arkansas and ***Haslip***. (Pet. 94a); 499 U.S. at 21.

Judge Arnold found no passion or prejudice on the part of the jurors and gave specific reasons for his finding. Judge Arnold observed that plaintiff's counsel did not resort to populist rhetoric, but at all times conducted himself in a polite and appropriate manner. He saw no overt manifestations of anger or irrationality in the behavior of the jury. Under the circumstances, the Court concluded that it would require "raw speculation to overturn or reduce the relevant awards on the basis that they were animated by passion or prejudice." (Pet. 122a.)

Judge Arnold concluded that his analysis would be the same under federal or state law. (Pet. 122a - 123a.)

The instructions to the jury were further constraints. The ***Haslip*** instructions were approved because they enlightened the jury as to the nature and purpose of punitive damages, identified the damages as punishment for the kind

of wrongdoing involved, and explained that their imposition was not compulsory. 499 U.S. at 19. The ***Robertson*** instructions satisfy these criteria and placed additional constraints on the jury as demonstrated by the following comparisons:

The Nature of the Act Which Triggers Punitive Damages

Haslip	**Robertson**
Should you award punitive damages, in fixing the amount you must take into consideration *the character and the degree of the wrong, as shown by* the evidence *and necessity of preventing similar wrong*. (Emphasis added) ***Haslip***, at 6 n.1.	In order to recover punitive damages from Phillips "Robertson . . . had the burden of proving that Phillips *intentionally pursued a course of conduct for the purpose* of causing injury or damage." (Emphasis added) (Appellant's App. at 52, *Robertson*, (No. 90-1451)).

Thus, the jury in ***Haslip*** was only generally told to consider "the character and degree of the wrong" with no guidance as to how egregious the conduct was or even whether the defendant intentionally harmed the plaintiff. ***Robertson***, on the other hand, demanded that the jury find a specific malicious state of mind and that Phillips intentionally "pursued a course of conduct," not a single "wrong" as in ***Haslip***.

The Purpose of Imposing Punitive Damages

Haslip	Robertson
...the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. ***Haslip*** at 6 n.1.	In addition to compensatory damages for the actual loss that Robertson sustained and has already recovered, it asks for punitive damages (which) may be imposed to punish a wrongdoer and to deter others from similar conduct. (Appellant's App. at 52, ***Robertson***, (No. 90-1451).)

Although both instructions refer to deterrence and retribution, the factors Justice Blackmun found sufficiently limiting in ***Haslip***, 499 U.S. at 19, the ***Robertson*** instruction imposed more control and suggested a more modest recovery. The jury was told that Robertson had already recovered his actual loss and was seeking an *additional* recovery against defendant *only* "to punish" "and to deter *others*" (not to punish and deter "defendant and others").

The Jury's Discretion in Imposing Punitive Damages

Haslip	Robertson
Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it *unless this jury*	You are not required to assess punitive damages against Phillips on either the allegations of fraud or that of intentional interference

feels that you should do so. (Emphasis added) ***Haslip*** at 6 n.1.

with contract, but you may do so *if justified by the evidence*. (Emphasis added) (Appellant's App. at 52, ***Robertson***, (No. 90-1451)).

Both instructions made it clear that the imposition is not required, but there the similarity ends. The ***Haslip*** jurors were instructed that the awarding of punitive damages is "*entirely* discretionary" depending on how "this jury *feels*." The Arkansas instruction was more restrictive and less inviting which stated that the jury "*may*" award punitive damages but only "*if justified by the evidence.*" Judge Arnold also told the jury on three separate occasions that it could award no punitive damages.

The jury was also asked in separate interrogatories whether punitive damages were justified at all with respect to the fraud count and tortious interference count. (***Robertson II*** Supp. App. at 12-13). Each question provided an independent check as to each cause of action on jury discretion not present in ***Haslip***.

Finally, Petitioner received one substantial additional due process protection only rarely given to any party - *en banc* review.

V.

THE TWO PUNITIVE DAMAGE AWARDS WERE NOT DUPLICATIVE BUT WERE APPORTIONED TO SEPARATE CONDUCT AS PETITIONER REQUESTED. EACH AWARD IS SUPPORTED BY THE EVIDENCE, THE JURY INSTRUCTIONS, THE LAW OF THE CASE, AND ESTOPPEL.

In essence, the issue of two awards is evidentiary and procedural but not constitutional. The jury at the second trial divided punitive damages according to Phillips' separate conduct of tortious interference and fraud. Phillips asked for this in ***Robertson I***. There, Phillips argued - successfully - that one punitive damage issue of $5 million was improper and should be reversed because the tort theories each involved separate factual foundations and it was not possible to attribute the punitive damages to the separate conduct of each theory. (Pet. 21a - 22a.) The ***Robertson I*** court agreed and reversed. Thus, two damage awards became the law of the case in ***Robertson I***. That decision became the basis for the second trial about which Petitioner now complains. (Pet. 19a.) The Eighth Circuit said that Phillips got what it asked for in ***Robertson I*** and is bound by what it received. (Pet. 22a, 77a.) Giving Phillips its way ought to satisfy, axiomatically, every test of due process.

In addition to Phillips' own advocacy, the evidence supports each award. The fraud and tortious interference were based on different conduct. The tortious interference occurred in a meeting in October, 1984 with Robertson's biggest customer. Petitioner insulted Robertson's largest customer and disparaged the performance of Robertson. (Pet. 22a, 100a.) The conduct for fraud occurred earlier - from May to October, 1984 before the tortious interference meeting. Phillips admitted this in ***Robertson I*** when it

argued in its reply brief that these were the two different time frames of the conduct that might support punitive damages. *See* Phillips' reply brief quoted in the *en banc* opinion. (Pet. 22a.) After the court adopted Phillips' position, Robertson was forced to try the case again based on Phillips' theory. Phillips got a second chance to zero Robertson on punitive damages.

When a litigant changes its position, and persuades the court to adopt its position, it is estopped. This plays "fast and loose with the court" and undermines the integrity of the judicial process. ***Allen v. Zurich Ins. Co.***, 667 F.2d 1162, 1166-8 (4th Cir. 1982); ***Morris v. California***, 966 F.2d 448, 453 (9th Cir.) ***cert. denied***, 113 S. Ct. 96 (1992). Phillips was estopped from claiming a position in conflict with what it successfully asserted at an earlier stage of this litigation. (Pet. 22a, 77a n.11.)

Phillips also claims now that, since there was a single injury and compensatory award to Robertson, there cannot be two punitive damage awards. Phillips said precisely the opposite in ***Robertson I***. (Pet. 21a.) There, Phillips agreed with the *en banc* opinion that punitive damages are not intended to compensate the victim. That is the function of actual damages. Punitive damages focus on the punishment and deterrence of the defendant, not on harm to the plaintiff. (Pet. 21a.)

Phillips has not been punished twice for the same conduct. The jury found separate punitive damages for tortious interference and separate punitive damages for fraud. The jury was instructed to assess damages for <u>each</u> cause of action and that it could find zero punitive damages for either or both causes of action. The jury was properly instructed on the separate elements of each cause of action. (Pet. 20a, 24a, and 96a.) The Eighth Circuit found that each element

of fraud and each element of tortious interference was supported by sufficient evidence. (Pet. 88a, 96a, 105a - 106a, and 114a.) Robertson was entitled to recover punitive damages for each cause of action because they related to two separate sets of conduct. If, as Phillips suggested in ***Robertson I***, we focus on the function of punishment and deterrence, the conduct to evaluate punitive damages is different from the actual damages. The nature, extent, and enormity of each of the wrongs, the intent of the party committing each of the wrongs, and the general circumstances attending each particular transaction involved differ with respect to each of the two punitive awards. (Pet. 20a.) Even now Phillips does not challenge that evidence. While Phillips labels this question one of due process, it is really evidentiary. The evidence supports each award.

As one would expect, Petitioner never objected to two punitive damage questions at the second trial since two awards were what it had requested at the first appeal. (Trial II Tr., Vol. 3 at 184, 189, 193-198). This is waived. Fed. R. Civ. P. 51.

Conclusion

During the eight years of this judicial journey, Phillips has had more due process than most litigants ever receive. Phillips has yet to accept responsibility for its own acts. Instead, it has blamed two juries, the trial judge, four appellate panels, and an imagined lack of standards. Under the circumstances, Petitioner's feigned loss of due process is purely hypothetical. Petitioner's concern is not about due process, but special process for itself to escape the consequences of its conduct. We respectfully suggest that fundamental fairness calls for this matter to end by this Court denying certiorari.

Respectfully Submitted

Julius Glickman*
Dennis G. Herlong
GLICKMAN & BARNETT, L.L.P.
1460 First City Tower
1001 Fannin
Houston, Texas 77002

James W. Jeans, Sr.
UMKC Law School
5100 Rockhill Road
Kansas City, MO 64110

Attorneys for Respondents
*Counsel of Record

SUPPLEMENTAL

APPENDIX

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES
DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERTSON OIL COMPANY PLAINTIFF

vs. No. 86-2120

PHILLIPS PETROLEUM COMPANY DEFENDANT

ORDER SATISFYING JUDGMENT AND DISCHARGING SURETY ON SUPERSEDEAS BOND

Now on this 10 day of August, 1989, upon the joint motion of the Plaintiff and the Defendant, the portion of the money Judgment for compensatory damages entered herein on October 22, 1987, which was affirmed by the Opinion and Order of the United States Court of Appeals for the Eighth Circuit filed March 31, 1989, be and the same are hereby satisfied in full, and the Defendant and Safeco Insurance Company of America be and the same are hereby released and discharged as principal and surety on the supersedeas bond filed herein on February 18, 1988.

/S/ Morris S. Arnold
UNITED STATES DISTRICT JUDGE

U.S. District
Western Dist. Arkansas
F I L E D
AUG 10 1989
CHRIS R. JOHNSON, CLERK
BY
Deputy

APPROVED:

Mr. William P. Thompson
THOMPSON, PADDOCK & LLEWELLYN
P.O. Box 818
Fort Smith, AR 72902

Mr. Julius Glickman
GLICKMAN & BARNETT
1460 First City Tower
1001 Fannin
Houston, TX 77022

By /s/ Julius Glickman
Attorneys for Plaintiff

NEAL F. LEHMAN
Attorney
Phillips Petroleum Company
Bartlesville, OK 74004
918-661-5650

Robert L. Jones, Jr.
JONES, GILBREATH, JACKSON & MOLL
P. O. Box 2023
Fort Smith, AR 72902-2023
501-782-7203

By /s/ Robert Jones, Jr.
Attorneys for Defendant